ORIGINAL

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Definition of Markets for	)	
Purposes of the Cable Television	)	
Mandatory Television Broadcast	)	CS Docket No. 95-178
Signal Carriage Rules	)	
	)	
Implementation of Section 301(d)	)	
of the Telecommunications Act of 1996	)	
	)	
Market Determinations		

To: The Commission

COMMENTS OF PAXSON COMMUNICATIONS CORPORATION

PAXSON COMMUNICATIONS
CORPORATION

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SUMMARY

In its *Further Notice of Proposed Rulemaking*, the Commission seeks comment on (1) how to ensure an orderly transition from ADIs to DMAs and (2) what changes to the market modification process may be necessary "given that administrative resources available to process Section 614(h) requests are limited." Paxson respectfully suggests that the best way to guarantee that the Commission's limited resources are utilized efficiently is to ensure that Congress' intent is followed in the market modification process. This can be done by relying on the industry standard DMA to define local television markets for *all* stations and by limiting the ability of cable operators to eviscerate their statutory carriage obligations through *ad hoc* exclusions of cable communities from these markets. In contrast, the proposal advanced in the *Further Notice* would add substantially to the already strong incentive for cable interests to file numerous petitions to delete communities from station markets. If adopted, this would inevitably place a very significant administrative burden on the Commission's staff.

Paxson believes that the proposals outlined in the *Further Notice* with respect to the market modification process are inconsistent with Congressional intent and would have the unfortunate effect of codifying the existing Bureau policy that improperly places a dispositive reliance on Grade B contours and distance in making market modification decisions.

Accordingly, Paxson submits that the Commission should take this opportunity to correct and enhance the market modification process by adopting a framework that will more effectively advance the value of localism as intended by Congress. A thorough analysis of the must-carry scheme and its underlying legislative history suggests that the Commission should revise the procedures currently used in dealing with requests to *delete* communities from a station's must-carry market to ensure that any such decisions comply with the clear intent of the 1992 Cable Act to foster diversity and competition among local television stations. Specifically, Paxson recommends that the Commission follow four steps in evaluating deletion requests:

1) When a cable system seeks to exclude a community from the market of a particular broadcast station, the Commission should first determine whether the station is in the same DMA as a cable system.

2) If the community and station at issue are in the same DMA, the Commission should then determine whether the cable system requesting relief has devoted one-third of the aggregate number of usable activated channels on its system to the carriage of local commercial television stations, as required by the 1992 Cable Act.

3) If the cable operator has not devoted one-third of its channels to local stations, the Commission should presumptively deny the operator's request, as it could not further the "value of localism" as mandated by the statute nor could it further the mission of the FCC to foster the fullest use of the television spectrum.

4) If the cable operator has devoted one-third of its channels to local stations, the Commission should determine whether modification of the station's market would further the value of localism in accordance with the four factors set forth in Section 614(h)(1)(C)(ii) of the 1992 Cable Act.

This approach will further the intent of Congress by limiting community exclusions that are obviously based on a cable operator's desire to avoid its carriage obligations and by

fostering the ability of new and struggling television stations to expand their local service offerings by increasing viewership and advertising revenues.

The Commission's proposed "evidentiary requirements," like past Bureau decisions, place far too much emphasis on distance, geography and Grade B coverage -- and, as a result, substantially erode Congress' intended presumption in favor of market-wide carriage of stations. In addition, the Commission's proposal would discriminate against small specialty stations by placing substantial reliance on historical carriage and audience data. Similarly, the Commission's alternative proposal to expedite consideration of market modification requests by "permitting the party seeking the modification to establish a *prima facie* case based on historical carriage, technical signal coverage of the area in question and off-air viewing" would discriminate against small specialty stations that are not currently carried on cable systems.

At a minimum, the Commission's market modification procedures should be amended to provide carriage of stations that commit to providing more locally produced public interest programming. Accordingly, Paxson supports the proposal advanced by WRNN to establish a presumption in favor of those stations willing to go on record with a commitment to present locally produced public interest programming. This would enable the Commission to better effectuate the purposes of Section 614 of the 1992 Cable Act by ensuring cable carriage of local stations so that such stations can, in turn, support the origination of local programming and compete with cable operators in a diverse television marketplace.

Finally, Paxson submits that the difference between ADIs and DMAs are significant enough to warrant a "fresh look" at the Bureau's previously decided market modification decisions. Allowing earlier ADI-based decisions to stand in the new regime of DMA-based market-designations will only perpetuate continued reliance on what is already an outdated standard. Therefore, past decisions based upon an ADI standard should not survive the change to use of DMAs to define markets. Since the Bureau's previous market modifications contravene the 1992 Cable Act, moreover, the adoption of the DMA standard presents an opportunity for the Commission to implement the market modification process as Congress intended.

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COMMENTS OF PAXSON COMMUNICATIONS CORPORATION

Paxson Communications Corporation ("Paxson") by its attorneys and pursuant to Section 1.415 of the Commission's Rules, hereby submits its comments in the above-captioned proceeding.[1]

INTRODUCTION

Paxson is an experienced operator of independent television stations, owning and operating facilities in over 20 markets. Paxson has pioneered a unique format combining program-length presentations by local and national businesses and community organizations with religious and local public affairs programming. Through its program-length presentations, Paxson provides on each of its television stations a

[1] *Report and Order and Further Notice of Proposed Rulemaking, Definition of Markets for Purposes of the Cable Television Mandatory Television Broadcast Signal Carriage Rules*, CS Docket No. 95-178, FCC 96-197 (rel. May 24, 1996) ("*Report and Order*").

valuable and effective platform for local merchants and other businesses -- as well as civic and minority organizations -- to communicate with residents of their communities. In addition, Paxson's stations present children's programming for several hours each week.

Paxson is committed to providing programming of local interest to all of the communities it serves. Based on its experience in the markets it serves, Paxson believes that as much as 45 percent of its program-length presentations will be produced by *local* businesses and religious, ethnic, and governmental organizations after a station has been airing such a format for two years.

As the owner and operator of a number of emerging specialty stations of the type Congress sought to benefit through inclusion of must-carry provisions in the Cable Television Consumer Protection and Competition Act of 1992 ("1992 Cable Act"), Paxson has a keen interest in ensuring that the transition to a market designation system based on Nielsen's designated market areas ("DMAs") is implemented in a manner fully consistent with the intent of Congress and in a way that serves the interests of fairness and administrative efficiency. Paxson strongly urges that any revisions to the Commission's current must-carry market modification rules comport with the will of Congress as expressed in the 1992 Cable Act and its accompanying legislative history.

For the reasons set forth below, Paxson respectfully suggests that the proposals outlined in the *Further Notice of Proposed Rulemaking* ("*Further Notice*") with respect to the market modification process would have the unfortunate effect of codifying the Cable Services Bureau's ("Bureau") current policy that improperly places a dispositive

reliance on Grade B contours and distance in making market modification decisions. Instead, Paxson urges the Commission to take this opportunity to correct and enhance the market modification process by adopting a framework that will more effectively advance the value of localism as intended by Congress and the FCC's own mandate to foster the fullest use of the television spectrum.

The must-carry provisions were enacted by Congress -- after the Supreme Court overturned the Commission's previous must-carry regime -- as part of a comprehensive effort reflected in the 1992 Cable Act to reregulate cable operators and foster competition and diversity in the video marketplace. Congress required each cable operator to devote up to one third of the aggregate number of usable activated channels on its system to the carriage of "local commercial television stations."[2] In defining a broadcast station's "local" market for must-carry purposes, Congress specifically rejected a mileage-based or geographic approach and, instead, defined a station's market by reference to Arbitron designated areas of dominant influence ("ADI").[3] Indeed, Congress recognized that "ADI lines are the most widely accepted definition of a television market and more accurately delineate the area in which a station provides local service than any arbitrary mileage-based definition."[4] By contrast, Congress

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[2] 47 U.S.C. § 534(b)(1)(A)-(B).

[3] *See* S. 12, 102d Cong., 1st Sess. §§ 4(g) and 15 (1991); H.R. 1303, 102d Cong., 1st Sess. § 5(a)(1991). H.R. 1303 preceded H.R. 4850, the legislation that passed the House in 1992.

[4] H.R. Rep. No. 102-628, at 97 (1992).

specified that a non-commercial station is entitled to carriage if its community of license is within 50 miles of the principal headend of the cable system.[5]

Recently, in recognition that Arbitron no longer updates its ADI designations, Congress modified the statutory provision specifying ADIs as the benchmark for market definitions and substituted a more general definition requiring that a broadcast station's must-carry market be defined by reference to "commercial publications which delineate television markets based on viewing patterns."[6] Based upon Congress' direction, the Commission concluded that it is appropriate to use Nielsen Media Research's DMAs for must-carry market definitions.[7] Because of its concern about the transition from one market definition to another and, in particular, "the relationship of such a change to the *ad hoc* market boundary change process," however, the Commission decided to continue to use Arbitron's *1991-1992 Television ADI Market Guide* for the 1996 must-carry/retransmission consent election and postpone the switch to Nielsen's DMAs until the 1999 election.[8]

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[5] *See* 47 U.S.C. § 535(l)(2).

[6] *Id.* § 534(h)(1)(C)(i).

[7] *Report and Order* ¶ 39.

[8] *Id.* ¶ 1. A broadcast station may elect whether it will be carried by the local cable television system under the mandatory carriage or retransmission consent rules. A station electing mandatory carriage is entitled to cable carriage in its local market. A station electing retransmission consent must negotiate the terms of carriage with the cable system and is entitled to receive compensation in exchange for carriage. Stations are required to make this election every three years. *See* 47 U.S.C. § 325(b).

In that connection, the procedure established by Congress in the 1992 Cable Act for modifying a station's must-carry market permits the Commission to add communities to or exclude them from a station's television market "to *better* effectuate the purposes of this section."[9] Further, Congress specifically provided that in ruling on market modification requests, "the Commission shall afford particular attention to the value of localism" by taking into account such factors as historic carriage of a station, coverage or other local service provided by the station, other stations' provision of such service to the relevant cable community, and the ratings of the station.[10]

The Commission's Cable Services Bureau, however, in a series of decisions modifying the must-carry markets of television stations, has relied almost exclusively on the location of the Grade B contours of stations and the distance between the cable communities and the station to delete communities from a station's must-carry market. The Bureau, however, has failed to explain how its decisions -- which have the effect of stripping the affected television stations of their carriage rights in portions of their markets -- advance localism or otherwise "better effectuate the purposes" of the mandatory carriage provisions. The Bureau's undue emphasis on an "arbitrary mileage-based definition" thus has begun to eviscerate substantially the ADI-wide mandatory carriage contemplated by Congress.

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[9] 47 U.S.C. § 534(h)(1)(C)(i) (emphasis added).

[10] *Id.* § 534(h)(1)(C)(ii)(I)-(IV).

By defining a station's market by its ADI (or DMA), Congress intended to ensure that smaller stations (with weaker technical facilities), such as Paxson's, are able to expand their local service by increasing their viewership and advertising revenues, and to compete effectively with established stations throughout the industry-defined commercial marketplace.[11] The inevitable result of the Bureau's approach, however, is to limit the market of such stations to the areas within their Grade B contours -- which often cover only a fraction of the full DMA. Only well-established stations with powerful signals (and sufficient bargaining power to elect retransmission consent procedures) would achieve carriage throughout the DMA, yet those stations have historically enjoyed cable carriage even in the absence of must-carry and were not the intended beneficiaries of the Act.

Clearly, the legislative history, language and even the name of the Cable Television Consumer Protection & *Competition* Act of 1992, reflect Congress' desire to promote a more competitive and diverse broadcast television market -- in this case, by *insuring greater cable carriage for weaker stations*, that generally have smaller signal coverage areas. The Bureau's policy has effectively denied must-carry protection to the very stations for whom the statute was enacted by employing an analysis which,

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[11] For example, Congress stated that the must-carry provisions were intended "to help new stations and stations that target special audiences to obtain carriage, thus increasing the diversity of local programming to viewers." S. Rep. No. 102-92, at 46 (1991), *reprinted in* 1992 U.S.C.C.A.N. 1133, 1179. Congress also expressed its clear intent through the must-carry provisions to "promote competition in local markets." H.R. Conf. Rep. No. 102-862, at 75 (1992), *reprinted in* 1992 U.S.C.C.A.N. 1231, 1257.

circularly and perversely, relies on the very characteristics (signal strength and close proximity) that such stations lack. More simply put, the must-carry provisions were intended to promote the competitiveness of smaller stations through greater cable carriage, yet the Bureau's policies have denied such smaller stations the benefits of must-carry precisely because such stations are small (*i.e.*, they have a smaller signal pattern and/or are farther away from other cable systems than the larger more dominant broadcasters which are typically in the center of the market, not on the fringe).

The Bureau's approach has created an impossible situation for the small broadcaster striving to compete in its market. The result of this policy could be analogized to a hypothetical situation in which Congress passes a law purporting to provide assistance to small family farmers, yet the responsible federal agency adopts "implementing regulations" exempting farms of less than 500 acres from the class of eligible beneficiaries. Simply put, the agency in this example will not let the small family farm grow. Here, as in the hypothetical example of the small farmer trying to compete with the larger agricultural enterprise, Congress intended to provide a level field upon which the smaller broadcaster -- through mandatory cable carriage -- has the opportunity to compete with the larger stations. The Bureau's implementation of the market modification procedures has thwarted this Congressional directive: the small broadcaster cannot even reach the market.

The Commission now seeks comment on (1) how to ensure an orderly transition from ADIs to DMAs and (2) what changes may be necessary "given that administrative resources available to process Section 614(h) requests are limited and the 1996

Telecommunications Act establishes a 120-day time period for action on these petitions." As explained below, Paxson submits that the best way to guarantee that the Commission's limited resources are utilized efficiently is to ensure that Congress' intent is followed in the market modification process by relying on the industry standard DMA to define local television markets and by limiting, rather than facilitating, the ability of cable operators to eviscerate their statutory carriage obligations through *ad hoc* exclusions of cable communities from these markets.

I. THE COMMISSION SHOULD ENSURE THE ORDERLY TRANSITION TO A NEW MARKET DEFINITION AND ADHERE TO CONGRESS' DIRECTIVE BY USING DMAS TO DEFINE THE MUST-CARRY MARKETS OF *ALL* STATIONS.

Congress, in passing the Telecommunications Act of 1996 ("1996 Act"), modified the reference point for definition of a broadcast station's must-carry market from the 1991-1992 ADIs to "commercial publications which delineate television markets based on viewing patterns."[12] In its *Report and Order* implementing Section 301(d) of the 1996 Act, the Commission concluded, based upon Congress' directive, that it is appropriate to use Nielsen Media Research's DMAs for must-carry elections.[13] As the Commission stated, "DMAs have become the television market

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[12] 47 U.S.C. § 534(h)(1)(C)(i).

[13] *Report and Order* ¶ 1. The Commission recognized that "[c]onceptually" Arbitron and Nielsen's market designations are the same -- "[t]hey both use audience surveys of cable and noncable households to determine the assignment of counties to television markets based on the market whose stations receive the largest share of viewing in the county." *Id.* ¶ 16.

standard for commercial purposes in the absence of any alternative. They represent the actual market areas in which broadcasters acquire programming and sell advertising."[14] The Commission also recognized that "DMA market designations . . . provide the best method of ensuring local stations access to the consumers they are licensed to serve and to provide cable subscribers with the stations best suited to their needs and interests."[15]

Although the Commission expresses concern that Nielsen utilizes factors other than viewing patterns to assign certain stations to a DMA, these factors represent very minor elements of the DMA determination. Moreover, adoption of DMAs for *all* stations fully complies with the language of the 1996 Act and Congressional intent. Congress certainly understood when passing the 1996 Act that Nielsen is now the only available source for market designations. As the Commission notes in the *Report and Order*, "Congress recognized Arbitron's departure from the television business and in the 1996 Act, replaced the specific language cross-referencing Arbitron's ADIs in Section 614 [of the 1992 Cable Act] with a more general definition of a local market."[16]

Indeed, Congress prescribed that the Commission use "where available, commercial publications."[17] Since Nielsen produces the only available commercial

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[14] *Id.* ¶ 39.

[15] *Id.* ¶ 43.

[16] *Report and Order* ¶ 13.

[17] 47 U.S.C. § 534(h)(1)(C)(i).

publication, Congress clearly intended to apply the DMA standard. Straightforward reliance on DMAs, moreover, will provide certainty for stations and cable operators, and will minimize the need for Commission involvement in market determinations. Thus, even in situations where an original DMA designation is subsequently modified by Nielsen, the Commission should respect Nielsen's market designation authority and recognize the Nielsen modified market as valid. Accordingly, the Commission should respect the explicit Congressional directive and use DMAs to define must-carry markets for *all* stations, regardless of what additional minor factors Nielsen may take into consideration in determining a particular station's DMA.

II. THE BUREAU'S PROCEDURES FOR DEALING WITH REQUESTS TO DELETE COMMUNITIES FROM A STATION'S MARKET SHOULD BE REVISED IN A MANNER THAT COMPLIES WITH THE 1992 CABLE ACT AND ENSURES ADMINISTRATIVE EFFICIENCY

The Commission also seeks comment on how its procedures for changing a television station's must-carry market in accordance with Section 614(h) of the 1992 Cable Act should be modified. The Commission suggests that changes "might be warranted given that administrative resources available to process Section 614(h) requests are limited and the 1996 Act establishes a 120-day time period for action on these petitions."[18]

Paxson submits that the Commission is correctly concerned with streamlining the market modification process to facilitate prompt decisions. In order to do so most

[18] *Further Notice* ¶ 52.

effectively, however, the Commission should focus on revising the procedures used in dealing with requests to *delete* communities from a station's must-carry market to ensure that these decisions comply with the clear intent of the 1992 Cable Act to foster diversity and competition among local television stations. Specifically, Paxson suggests that the Commission follow four steps in evaluating such deletion requests:

1) When a cable system seeks to exclude a community from the market of a particular broadcast station, the Commission should first determine whether the station is in the same DMA as the cable system.

2) If the community and station at issue are in the same DMA, the Commission should then determine whether the cable system requesting relief has devoted one-third of the aggregate number of usable activated channels on its system to the carriage of local commercial television stations, as required by the 1992 Cable Act.[19]

3) If the cable operator has not devoted one-third of its channels to local stations, the Commission should presumptively deny the operator's request, as it could not further the "value of localism" as mandated by the statute nor could it further the mission of the FCC to foster the fullest use of the television spectrum.[20]

4) If the cable operator has devoted one-third of its channels to local stations, the Commission should determine whether modification of the station's market would further the value of localism in accordance with the four factors set forth in the Section 614(h)(1)(C)(ii) of the 1992 Cable Act.[21]

This suggested approach will further the intent of Congress by limiting community exclusions that are obviously based on a cable operator's desire to avoid its

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[19] If the cable system has 12 or fewer usable channels and over 300 subscribers, Paxson recognizes that it need only carry the signals of three local commercial television stations. 47 U.S.C. § 534(b)(1)(A).

[20] *Id.* § 534(h)(1)(C)(ii).

[21] *Id.* § 534(h)(1)(C)(ii)(I)-(IV).

carriage obligations and by fostering the ability of new and struggling television stations to expand their local service offerings by increasing viewership and advertising revenues, thereby allowing for true competition with established stations within a television market. Furthermore, this proposal would ensure that cable subscribers receive diverse local programming from the full complement of broadcast television stations intended by Congress. In fact, Congress appreciated both the small broadcasters' need to compete and the cable operators' need to provide diverse programming. To that end, Congress determined that a cable operator is not required to carry the signal of a local commercial television station that substantially duplicates the signal of another local commercial station which is carried on its system or the signal of more than one broadcast network affiliate -- even if the cable system has not fulfilled its local set-aside obligations.[22] Thus, Congress ensures the diversity of programming by coupling the must-carry provisions with the ability to reject duplicative programming. Otherwise, however, cable operators should be expected to carry the full complement of local stations as intended by Congress.

The revised procedure is clearly warranted, moreover, to correct current Commission policies in this area, which have departed from the approach expressly chosen by Congress when it restored the must-carry rights of local television stations and set-aside one third of activated channels for such must-carry purposes. A review of the plain language of the 1992 Cable Act and its accompanying legislative history

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[22] *See Id.* § 534(b)(5).

illustrates that the Commission's current market modification practice -- as exemplified in a growing line of Bureau decisions -- contravenes Congressional intent.

Section 614 of the Communications Act was enacted by Congress as part of its comprehensive 1992 effort to reregulate cable operators and foster competition and diversity in the video marketplace. That provision obligates a cable operator to devote up to one third of the aggregate number of usable activated channels on its system to the carriage of local commercial television stations.[23] In relevant part, the statute defines "local commercial television station" as a full power station that, "with respect to a particular cable system, is within the same television market as the cable system."[24] Section 614, as amended by the 1996 Act, further provides that a station's television market "shall be determined by the Commission by regulation or order using, where available, commercial publications which delineate television markets based on viewing patterns."[25] As noted above, in the *Report and Order* the Commission determined that, starting in 1999, must-carry markets will be defined by the only such commercial publication currently available -- Nielsen's listing of DMAs.[26]

The 1992 Cable Act provides for certain narrowly limited "exclusions" to the obligation of cable systems to carry a television station throughout its ADI. Specifically, Section 614(h)(1)(B)(iii) provides that a station will not be entitled to

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[23] *See Id.* § 534(b)(1).

[24] *Id.* § 534(h)(1)(A).

[25] *Id.* § 534(h)(1)(C)(i).

[26] *Report and Order* ¶ 39.

carriage unless it provides a good quality signal over-the-air *or* agrees to assume the cost of delivering a good quality signal to the cable system. Thus, must-carry rights are not available to

> a television broadcast station that does not deliver to the principal headend of a cable system either a signal level of -45 dBm for UHF signals or -49 dBm for VHF signals at the input terminals of the signal processing equipment, if such station does not agree to be responsible for the costs of delivering to the cable system a signal of good quality or a baseband video signal.[27]

In other words, the statute clearly contemplates that as a general rule a qualified station will be entitled to carriage on systems within its market but outside its over-the-air service area, so long as the station pays to amplify or otherwise enhance sufficiently its signal level. Indeed, the Commission has expressly ruled that a local station may deliver a good quality signal to cable headends by any number of methods:

> [W]e generally agree with the cable interests that it is the television station's obligation to bear the costs associated with delivering a good quality signal to the system's principal headend. This may include improved antennas, increased tower height, microwave relay equipment, amplification equipment and tests that may be needed to determine whether the station's signal complies with the signal strength requirements . . . .[28]

In fact, the Bureau has ruled that even satellite delivery of a signal is permissible.[29] In short, the statutory must-carry scheme clearly and unquestionably contemplates

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[27] 47 U.S.C. § 534(h)(1)(B)(iii).

[28] *Implementation of the Cable Television Consumer Protection and Competition Act of 1992, Broadcast Signal Issues, Report and Order*, 8 FCC Rcd 2965, 2991 (1993) (*"Must-Carry Order"*). The Commission further delineated this policy in its *Broadcast Signal Carriage Issues Clarification Order,* 8 FCC Rcd 4142, 4144 (1993).

[29] *See* Letter from Meredith J. Jones to John R. Feore, Jr., December 9, 1994.

market-wide carriage, provided that the station takes the necessary steps to deliver a good quality signal to the cable headend.

To be sure, the statute also provides for FCC modification of a station's must-carry market in limited circumstances. Section 614(h)(1)(C)(i) states that, upon a written request, the Commission may add communities to or exclude communities from a station's television market "to better effectuate the purposes of this section."[30] According to the "findings" section of the 1992 Cable Act, the purposes of Section 614 are to ensure cable carriage of local stations so that stations can support the origination of local programming, and to counteract cable operators' obvious economic incentive to delete local stations that compete with the operators for advertising revenue.[31]

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[30] 47 U.S.C. § 534(h)(1)(C)(i).

[31] *See* Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, § 2(a)(11)-(18), 106 Stat. 1460, 1461-62. Subsection 15 provides that

> [a] cable television system which carries the signal of a local television broadcaster is assisting the broadcaster to increase its viewership, and thereby attract additional advertising revenues that otherwise might be earned by the cable system operators. As a result, there is an economic incentive for cable systems to terminate the retransmission of the broadcast signal, refuse to carry new signals, or reposition a broadcast signal to a disadvantageous channel position. There is a substantial likelihood that absent the reimposition of such a requirement, additional local broadcast signals will be deleted, repositioned, or not carried.

Subsection 16 in turn states that

> [a]s a result of the economic incentive that cable systems have to delete, reposition, or not carry local broadcast signals, coupled with the absence of a requirement that such systems carry local broadcast signals, the economic viability of free local broadcast television and its ability to originate quality local programming will be seriously jeopardized.

Consistent with this remedial purpose to *expand* the carriage rights of stations, the law further states that "the Commission may determine that particular communities are part of more than one television market."[32] Congress gave the FCC specific guidance for ruling on market modification requests, stating that "the Commission shall afford particular attention to the value of localism" by taking into account such factors as historic carriage of a station, coverage or other local service provided by the station, other stations' provision of such service to the relevant cable community, and the ratings of the station.[33]

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[32] 47 U.S.C. § 534(h)(1)(C)(i).

[33] *Id.* § 534(h)(1)(C)(ii)(I)-(IV). The statute states in full that

> the Commission shall afford particular attention to the value of localism by taking into account such factors as --
>
> > (I) whether the station, or other stations located in the same area, have been historically carried on the cable system or systems within such community;
> >
> > (II) whether the television station provides coverage or other local service to such community;
> >
> > (III) whether any other television station that is eligible to be carried by a cable system in such community in fulfillment of the requirements of this section provides news coverage of issues of concern to such community or provides news coverage of issues of concern to such community or provides carriage or coverage of sporting and other events of interest to the community; and
> >
> > (IV) evidence of viewing patterns in cable and noncable households within the areas served by the cable system or systems in such community.

In determining whether to *add additional* communities within a station's market in order to strengthen the amount of local broadcast content delivered by cable systems to subscribers, it is evident that what is called for is a careful evaluation and balancing of those four factors. In contrast, in cases involving the proposed *deletion* of communities from a station's market, it is a much simpler and more straightforward task to determine whether the proposed deletion furthers "the value of localism." Indeed, the only readily apparent circumstance in which deletion of a local station would enhance localism is the rare instance of a capacity-constrained cable system that is unable, in the absence of a deletion, to carry the signal of another station (*e.g.*, a nearby but out-of-market station) that provides demonstrably *more local* service.

The House Report[34] on the 1992 Cable Act, moreover, confirms that the Commission should exclude communities from a station's market *only* where it could be shown that cable subscribers would otherwise lose access to local signals:

> [W]here the presumption in favor of ADI carriage would result in cable subscribers *losing* access to local stations because they are outside the ADI in which a local cable system operates, the FCC may make an adjustment to include or exclude particular communities from a television station's market consistent with Congress' objective to ensure that television stations be carried in the areas which they serve and which form their economic market.[35]

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[34] The original form of the 1992 Cable Act, S. 12, contained no provision for ADI modification, but the House bill, H.R. 4850 included such a provision, Section 614(h). Since the Conference Committee accepted the House provision without amendment and codified that provision into the statute at 47 U.S.C. § 534(h) unchanged, the legislative history provided by the House Report is controlling.

[35] H.R. Rep. No. 102-628, at 97 (1992)(emphasis added). Congress clearly (continued...)

Accordingly, Paxson submits, a cable operator should be able to overcome the presumption in favor of market-wide carriage *only* in a situation where carriage of a station would force the cable operator to drop another local (but out of ADI) station that provides more service to the cable community in question.

The presumption in favor of carriage of a station throughout its ADI -- or, now, its DMA -- moreover, reflects the overriding purpose of the 1992 Cable Act to foster the development of competition among stations within the same economic market, while allowing for the efficient use of Commission resources to achieve this goal.[36] Permitting cable operators to avoid carriage of stations without demonstrating that they will be precluded from carrying another local, but out-of-market station, would subvert the clear intent of Congress to ensure that small, specialty stations are allowed to compete effectively in the television marketplace. Indeed, Congress explicitly intended the must-carry provisions "to help new stations and stations that target special audiences to obtain carriage, thus increasing the diversity of local programming to viewers."[37]

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[35](...continued)
intended that the ADI modification procedures would be used primarily to add, rather than delete, stations from a station's must-carry market. The House Report speaks of the factors that "may be used to demonstrate that a community *is part of* a particular station's market." *Id.* (emphasis added).

[36] "The conferees find that the must-carry and channel positioning provisions in the bill are the only means to protect the federal system of television allocations, and to *promote competition in local markets*." H.R. Conf. Rep. No. 102-862, at 75 (1992), *reprinted in* 1992 U.S.C.C.A.N. 1231, 1257 (emphasis added).

[37] S. Rep. No. 102-92, at 46 (1991), *reprinted in* 1992 U.S.C.C.A.N. 1133, 1179.